

**GUIDANCE ON AGREEMENTS
WITH THE SECRETARY OF STATE
FOR TRANSPORT UNDER
SECTION 278 OF THE HIGHWAYS
ACT 1980**

February 2007

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Introduction

1. Agreements for the private-sector funding of works on the strategic road network are made under section 278 of the Highways Act 1980, as amended by section 23 of the New Roads and Street Works Act 1991. These agreements provide a financial mechanism for ensuring delivery of mitigation works identified and determined as necessary for planning permission to be granted. It does not mean that the Highways Agency will support a developer in any planning application or subsequent proceedings.
2. The Highways Agency ('the Agency') is an Executive Agency of the Department for Transport. It operates, maintains, improves and manages the strategic road network in England on behalf of the Secretary of State for Transport ('the Secretary of State'). The Agency carries out all negotiations on section 278 (s.278) agreements on behalf of the Secretary of State.¹
3. Wherever possible the Agency will seek to implement measures that manage the demand and impact on the strategic road network (SRN)² created by proposed developments, before improvement works are considered. In the first instance, any improvement works will be geared to managing the impact of additional road users and maximising the use of available road capacity (i.e. traffic control measures). The use of improvement works to create additional road space will only be considered after other options have been implemented, and then only in exceptional circumstances.
4. This guidance gives advice on the application of the s.278 process and the steps which will need to be taken by the developer and others, when such an agreement is contemplated. The guidance applies to any part of the SRN, including those routes where a Design Build Finance Operate (DBFO) contract has been awarded.
5. A developer may also enter into a s.278 agreement with a LHA for mitigation measures which may include improvement works to local roads, as well as with the Secretary of State for works on the SRN. This guidance is confined to s.278 agreements with the Secretary of State for works on the strategic road network.

¹ For convenience and ease of comprehension in this Guidance, reference is often made to the Agency, although it must at all times be appreciated that any duties, obligations or rights are those of the Secretary of State and the contracting party is the Secretary of State and not the Agency.

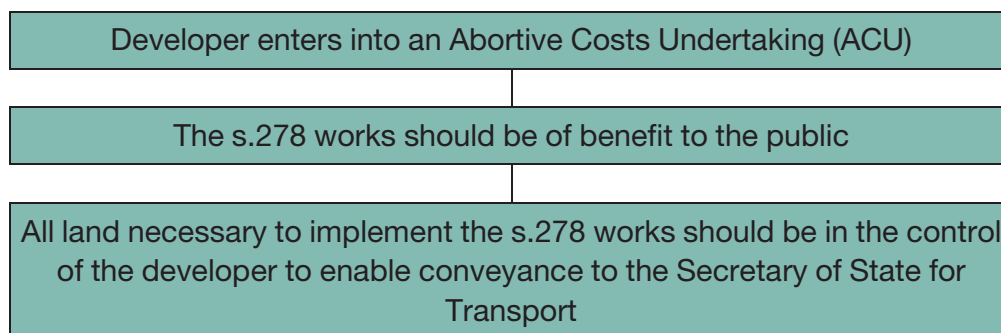
² The term SRN can be used interchangeably with Trunk Road Network (TRN). The Highways Act 1980 refers to the trunk road, not strategic road.

6. This guidance note sets out the basic framework and principles involved in the process of:
- determining the form of a section s.278 agreement
 - satisfying the prerequisites of a s.278 agreement
 - providing suitable mechanisms for cost recovery
 - dealing with any land conveyance necessary for dedication to public highway
 - how the works³ would be carried out
 - providing basic formats of s.278 agreements with draft core documents
 - Standard (one-part) agreement – where the Secretary of State both employs a design agent and carries out the works using its own contractor at the developer’s expense
 - Four-part agreement - for larger scale projects where the Secretary of State employs a Design Agent, at the Developer’s expense, and then carries out the works using the Developer’s Contractor
 - Five-part agreement - where the developer employs both the design agent and contractor, with the Agency undertaking a design check at the developer’s expense
 - Multi-party agreement – entered by three or more of: the Secretary of State, Local Transport Authority (LTA)/Local Highway Authority (LHA), developer and surety

³ The definition of works incorporates measures that can be carried out on the strategic road network. These works and measures include, but are not limited to traffic control measures, the covering of administrative costs to realise the works and planning obligations imposed on a developer.

The process

7. There are a number of prerequisites that must be met before the Secretary of State can enter into a s.278 agreement. These prerequisites may not apply to agreements entered into by an LTA/LHA, as these authorities may have local policies. Developers will need to ascertain any local requirements through liaison with the LTA/LHA.
8. The following chart sets out the basic prerequisites:



9. Abortive Costs Undertaking

- a. Before the Agency can expend any resources beyond initial discussions to establish the commencement of the s.278 process, the Agency must first secure indemnification from the developer for all costs it might incur.
- b. The mechanism by which such indemnification can be achieved is via an Abortive Costs Undertaking (ACU).
- c. The ACU is an agreement between the Developer and the Secretary of State, binding the developer to fund all work by the Agency to effect the s.278 agreement. It ensures that the Agency cannot be out of pocket should the process be stalled or aborted by the developer prior to formal completion of the s.278 agreement itself.
- d. The ACU can take two forms:
 - i. An undertaking by the developer to pay any and all abortive costs incurred by the Agency, backed by a surety/bond; or
 - ii. A financial deposit provided by the developer into an escrow account. Such initial deposit being equal to twice the estimated value of the work to be undertaken by the Agency to bring a s.278 agreement to the point of it being signed by both parties. All unused monies (including any interest) from the escrow account to be returned to the developer upon conclusion.
- e. The Agency has no preference which option is used, but in the interests of speed and efficiency, option (dii) above is generally the most rapid to set up.

10. Benefit

- a. The Secretary of State must be satisfied that the proposed works covered by the s.278 agreement will be of benefit to the public/users of the SRN.

11. Land control

- a. The developer must normally be in a position to convey to the Secretary of State the freehold, free of charge and other encumbrances, of any and all land that would be required to enable implementation of the works which are to be funded by the developer. The Secretary of State will not be in a position to let the contract for the works proceed until the required land is in the Secretary of State's possession.
- b. Section 278(4) of the Highways Act 1980 does grant the Secretary of State powers of compulsory purchase in order to progress developer funded works but these will be used only in the most exceptional cases. Developers should be aware in any case that processing compulsory purchase orders is seldom a quick or straightforward process; that objections are the rule rather than the exception; and that they commonly result in public inquiry. Section 278(4) powers are therefore likely to be used only where the works concerned would be of a particular benefit to the public and where the developer can show that he has exhausted all other reasonable methods of acquiring the lands. All the costs of using such powers will be borne by the developer.

Contractual arrangements for the s.278 works

12. Contractual arrangements for undertaking the works can take four basic forms, although the preference of the Agency is for Option A given below:

Option A	Secretary of State employer for the s.278 works affecting only the SRN
Option B(i)	Secretary of State employer for the s.278 works via a s.4 Highways Act 1980 agreement with the LTA/LHA
Option B(ii)	LTA/LHA employer for the s.278 works via a s.6 Highways Act 1980 agreement with the Secretary of State
Option C	The developer may be the employer

- a. **Option A** Where the works are wholly or mainly on the SRN: Secretary of State will be the employer in a contract for the works which will be carried out on the SRN, with the developer funding the whole costs of the works through the mechanics of the s.278 agreement.
- b. **Option B(i)** Where the works affect both the SRN and local highway network: Where the majority of the works are on the SRN, with only a minor element on the local highway network, the Secretary of State will generally be the employer for any contract, with the developer funding the whole costs of the contract works through the mechanics of the s.278 agreement. The Secretary of State would enter into a s.4 agreement of the Highways Act 1980, which enables the Agency to act on behalf of the local highway authority for the part of the measures/works affecting the local highway network.
- c. **Option B(ii)** Where the works affect both the SRN and local highway network: Where the majority of the works are on the local highway network, with only a minor element on the SRN, normally the Local Highway Authority will be the employer for any implementation contract, with the developer funding the whole costs of the contract works through the mechanics of the s.278 Agreement. The Secretary of State would enter into a s.6 agreement of the Highways Act 1980, which enables the local highway authority to act on behalf of the Secretary of State for the part of the works affecting the SRN. However, Option B(i) may also be used where the particular circumstances of the scheme

dictate a particular need to protect the interests of the Secretary of State (for example, under Construction Design and Management Regulations).

- d. **Option C** The developer may in some circumstances be the employer for the s.278 works undertaking them under powers of entry onto the highway network (SRN and/or local highway network) afforded by the s.278 agreement. For example, this could be an appropriate route where a particular developer acts as ‘ringmaster’,⁴ drawing together a number of development led work increments via one contract.

13. In terms of the contractual arrangements for the works, there are three basic forms of s.278 agreement documentation as follows:

- a. A standard agreement which relates to Options A, B(i) and B(ii);
- b. A 4 part agreement which also relates to Options A, B(i) and B(ii); or
- c. A 5 part agreement which relates to Option C

14. In the case of Option B(ii), where the majority of the measures/works are on the local highway network, and it has been agreed between the two authorities that the LTA/LHA will take control and act on behalf of the Agency for the minor SRN aspects of the work, then the s.278 agreement will generally be dealt with by the LTA/LHA. Hence the format of the legal document may be that employed by the LTA/LHA legal department as agreed with the developer. In such cases, the interests of the Agency will be protected by means of the legal agreement through a s.6 Agreement of the Highways Act 1980.

⁴ The ringmaster is an organisation, or public body, that will co-ordinate investment commitments for a particular development or series of developments. It will be responsible for ensuring that developers’ contributions allow the infrastructure to be secured in a fair and equitable way. The Highways Agency will not act as a ringmaster, but will work with the designated ringmaster to facilitate the delivery of appropriate schemes.

Costs to be paid by the developer

15. It is a fundamental principle of all s.278 agreements that the developer must bear the full cost of administering the process, designing and implementing the works. These will normally include:
 - a. An administration fee. This covers the design, preparation and supervision of the works and the administrative expenses of the Agency and its agents. The initial fee calculation will generally be expressed as a percentage of the estimated works costs (excluding VAT), though actual costs will be used where these can be identified. The level of administration fee will vary according to the nature and complexity of the tasks required under this heading. The need or otherwise for orders and public inquiries and the cost of the works are therefore among the factors that will be taken into consideration. Developers should be aware that low value schemes may require a higher percentage fee to cover Agency costs. As a guide, developers can expect to pay an initial fee followed by adjustment up or down when actual costs are known. The Agency currently invoices separately for costs associated with – design and preparation, site supervision and Agency administration;
 - b. Costs incurred in meeting any claims arising from implementation of the works, including claims under Part I of the Land Compensation Act 1973 (as amended by the Local Government Planning and Land Act 1980); legal costs involved in the transfer of the land or the full cost to the Secretary of State of exercising compulsory purchase powers (including those of any public inquiry and High Court challenge); the costs of any agreement with the local authority under section 4 or section 6 of the Highways Act 1980; and the costs of any Highway or Traffic Regulation Orders;
 - c. The cost of the contractual work for scheme implementation;
 - d. The cost of post contract work identified through the Road Safety Audit process;
 - e. In all cases, regardless of the nature of the works, a sum equal to the non recoverable VAT incurred on the costs listed above; and
 - f. A commuted lump sum to cover future maintenance of all new strategic road infrastructure. Current guidance on this can be obtained directly from the Agency.
16. Provision will usually be made for staged payments of the estimated costs, with adjustments in the light of final outturn cost. Payment in advance will be required in order to ensure that the Agency remains in funds.
17. The Agency will seek a Surety or Bond to secure performance of the developer's obligations under the agreement if full payment is not made on signing of the s.278 agreement. This will replace the earlier undertaking to meet the Agency's abortive costs up to the signing of the s.278 agreement.

Form of agreement

18. The Appendix this guidance sets out the key elements likely to feature in a s.278 agreement. The Agency, having consulted the Department for Transport's legal advisers, will supply the first draft of the proposed agreement to the developer's solicitors or other appointed representatives.
19. The terms of the agreement will indicate the conditions to which the parties will be subject, one of which will be a requirement that the developer shall have secured the necessary planning permissions as well as due authorisation for the Secretary of State to carry out the works. The agreement will regulate the amount and timing of the payments by the developer to the Agency and any relevant adjustments in the light of outturn costs; provide for termination of the agreement on either side, subject to payment of the Agency's abortive costs; and specify the works in question while permitting the Secretary of State to vary the works as necessary.
20. The Standard Agreement where the Secretary of State will be the Employer comprises the standard s.278 pro-forma which is the main s.278 agreement document. A shortened version of the agreement may be appropriate in cases involving relatively minor improvements to a trunk road, where the Agency will carry out the works provided that the general principles given in this note are not compromised.
21. The four-part agreement where the Secretary of State will be the employer comprises:
 - a. s.278 four-part pro-forma
 - Main s.278 agreement document
 - b. Deed of warranty pro-forma
 - Warranty in favour of the Secretary of State
 - c. Deed of design warranty pro-forma
 - Warranty given by designer to the Secretary of State
 - d. Sub-contract pro-forma
 - For situations where the main contractor sub-contracts any part of the work content.

- 22.** The five-part agreement where the developer will be the employer comprises:
- a. s.278 five-part pro-forma
 - Main s.278 agreement document
 - b. Building contract pro-forma
 - Agreement between the Secretary of State and developer whereby the role of design and implementation is delegated to the developer.
 - c. Deed of warranty pro-forma
 - Warranty in favour of the Secretary of State
 - d. Deed of design warranty pro-forma
 - Warranty given by designer to the Secretary of State
 - e. Sub-contract pro-forma
 - For situations where the main contractor sub-contracts any part of the work content.

Multiple-authority s.278 agreement

23. There are cases where multiple highway authorities (most commonly the Secretary of State and an LTA/LHA) need to form a joint legal agreement with a developer to ensure that a mutually required package of measures which affect both authorities' networks can be controlled. This could also apply to the situation whereby a development proposal is close to the border between two LTA/LHAs and the mitigation measures required might be capacity management controls at junctions within both LTA/LHA areas.
24. Whilst it may be less common, there might also be circumstances where three highway authorities are involved. For example, where two LTA/LHAs boundaries are over-sailed by a motorway and a development is proposed at a junction which straddles all three highway authority interests.
25. The purpose of a multi-party agreement is to ensure that, where a combination of measures/controls are required to provide the appropriate mitigation for a development, and where such measures fall within multiple authorities' areas, provision of the necessary complete combination can be guaranteed by a legally enforceable agreement.
26. The agreement will generally have two schedules; one which sets out any 'trigger points' which determine when the s.278 works are required; the other would set out any 'qualifying event(s)' which would enable an authority to 'step-in' and have the s.278 works carried out where another was in default.
27. The nature of a multi-authority agreement is an additional form of agreement that can be applied to any of the s.278 based options referred to in paragraph 15 above. This additional element is an agreement between all parties, LTA/LHA (possibly two), the Secretary of State, developer and where appropriate a surety, which:
 - a. binds all parties to provide the works set out in the agreement.
 - b. has 'step-in' rights for a highway authority if there is a default by any party in the fulfilment of the terms of the agreement.
 - c. allows draw-down of escrow or bond funds to complete works where such are the subject of a staged arrangement with triggers, such as non-achievement of travel plan targets.
28. The agreement would contain schedules specifying the works, which highway authority's area those works would be situated in, and what linkages/interactions exist between those works to fully meet the mitigation requirements.

Timing of agreement – interaction with other procedures

- 29.** Agreements may be made at any of a number of stages depending on circumstances. In most cases they will follow the grant of planning permission, though occasionally it may be appropriate to prepare an agreed document before the planning permission stage. In that event the agreement or the signing of it would have to be conditional on planning permission being granted. This is likely to be the case, for example, where planning applications are to be determined following call-in by the Secretary of State or on appeal.
- 30.** As section 278 of the Act does not in itself authorise the Secretary of State to carry out trunk road works, other authority in the form of the making of Orders may be necessary. For example this would be required where improvements change the routing options for motorists at junctions.
- 31.** In many cases the proposed works will be ones which the Secretary of State is authorised to carry out under his general powers in Part V of the Highways Act 1980. Otherwise, authorisation will involve the making of Orders under, for example, sections 10 or 14 of the Highways Act 1980. In these cases the Orders can be made only following public advertisement of a draft and, where a public inquiry has taken place, consideration of the Inspector's report. Permanent or temporary orders under the Road Traffic Regulation Act 1984 may also be required. The Secretary of State cannot fetter the exercise of his discretion with regard to the making of such Orders. Accordingly, where authorisation to execute the works requires the making of a statutory Order, the agreement will need to be conditional on that authorisation being obtained and on the Secretary of State deciding to implement it. In any case where the Secretary of State's land acquisition powers under Part XII of the Highways Act 1980 are to be used, the agreement will need to be conditional upon the successful processing of an Order under those powers.

Steps to be taken by the developer

32. Developers contemplating a s.278 agreement should make an early approach to the appropriate Agency contact to open preliminary discussions. It is important that approaches of this sort are made in good time in view of the stages which have to be completed before an agreement can take effect and the relevant trunk road works carried out. On the other hand, it is desirable, if the Agency is to give a reliable indication of its view on the possibility of an agreement, that the proposals should be sufficiently worked up for trunk road implications to be assessed and the location and nature of works determined.
33. If it is established in the initial discussions that the Agency is prepared to consider further the possibility of a s.278 agreement, the next step will be for the developer to submit further details. In particular, they will need to provide:
- An assessment of the extent of the proposed works including outline plans;
 - Budget costs (including utility company costs) based on suitable professional advice;
 - a proposed timescale; and
 - In the case where a developer initiates the preliminary design process, the name of a consultant approved by the Agency to design the measures/works.
 - The developer and their consultants must ensure compliance with all aspects of the Construction (Design & Management) Regulations 1994.
 - Where the developer instigates any part of the design process, they should ensure that appropriate Road Safety Audits are carried out at specified stages of the process.
 - All aspects of highway design must comply with the latest version of the *Design Manual for Roads and Bridges*.
 - Should a 'design departure' be proposed, then it would have to go through the formal Agency Departure Approval process before it could be accepted as part of the final design.
 - Information to be supplied by the developer for preparation of the agreement (not an exhaustive list):
 - a. Developer's full name and address
 - b. Contact details if different to the above
 - c. Names and addresses of parties to the agreement
 - d. Details of developer's solicitors
 - e. Proof of land title where appropriate

- f. Details of planning permission
- g. Location of site and 6 copies of plan showing application site
- h. 6 copies of general layout plan of works showing limit of works
- i. Detailed description of the highway works
- j. Estimated cost of the highway works
- k. Estimated value for any commuted sum payment
- l. The area of land (if any) to be transferred to the Secretary of State
- m. Details to set up the escrow account

Arrangements for the carrying out of the works

34. Since the Secretary of State is legally responsible for all road works on the strategic network, it follows that he will usually insist on acting as formal employer of the contractor carrying out those works. Similarly, any consultant engaged in design and supervision will be employed by the Secretary of State rather than the developer. The Agency will consider allowing the developer's consultants to design the works subject to approval of the consultants' competence but will need to arrange for the work to be independently validated at the developer's expense. In these cases the Agency will be prepared to consider using the developer's construction contractor subject to the following procedures:
- EC requirements on competitive tendering;
 - The contractor being pre-qualified by the Agency; and
 - The appropriate warranties being provided as set out in the s.278 five-part agreement.
35. It should be stressed that, if the estimated cost of the works contract (including VAT) exceeds the threshold for EC advertising, the contract must be advertised under *EU Official Journal* procedures and responses considered in the usual way.
36. The Agency may, on seeing further details, conclude that a developer's proposals should not be taken forward. Should there nevertheless appear to be a realistic prospect of achieving an acceptable solution following further discussions, the Agency will secure an undertaking to cover abortive costs before going further. Only at this stage would the Agency proceed to the stage of drawing up further information and documentation or a s.278 agreement.
37. Preparatory work may have to be carried out on a contingency basis pending formal grant of planning permission or completion of other procedures. It is however desirable, notwithstanding the risk of abortive costs, for such work to begin as early as possible to avoid delay at later stages.
38. Once the Agency has the information necessary to prepare a first draft of an agreement, its legal advisors will normally expect to issue that draft within about four weeks. Progress thereafter will inevitably depend on the complexity of the works involved and the developer's ability to provide any further details necessary to allow the agreement to be completed.

39. It should be noted that any works on the SRN will require coordination in terms of programmed execution, so as to avoid conflict with any other planned works to the SRN. Also, works on the SRN cannot be commenced immediately – for example, the Agency requires a mobilisation period of six weeks before works can begin.

Appendix: Key features of a section 278 agreement

Recite the planning permission which gives authorisation for the works to be undertaken in connection with the development

Provide for the Secretary of State to carry out the works to which the said authorisation pertains

Give the financial mechanisms by which the developer funds the whole of the works, including VAT, together with any other contingent expenditure properly incurred by the Agency, but which it cannot otherwise recover

Give the mechanisms which set out the obligations of the developer in respect of stage payments to the Agency

Provide a mechanism by which the developer shall meet the Secretary of State's administration costs

Make provision for a commuted sum payment in respect of future maintenance of additional infrastructures

Provide for the developer to convey any land necessary for the formation of additional highway infrastructure

Give provisions for the termination of the agreement by either party, including the restoration of conveyed land and recovery of the Secretary of State's abortive costs

Provide a mechanism for imposing interest on sums overdue

Provide a mechanism for a surety or bond

Provide a schedule of the works to be undertaken

Include plans depicting the works, and any land required to be conveyed